

SOUTHERN ENVIRONMENTAL LAW CENTER

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December 18, 2019

VIA FOIAonline¹

Ms. Gayla Mendez
Regional Freedom of Information Officer
U.S. Environmental Protection Agency Region 4
AFC Bldg., 61 Forsyth Street, S.W., 9th Flr. (4PM/IF)
Atlanta, GA 30303-8960

Re: Freedom of Information Act Request: Smalley-Piper Superfund Site, Collierville, Tennessee

Dear Ms. Mendez:

Under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended, the Southern Environmental Law Center (SELC), on behalf of Protect Our Aquifer and Tennessee Chapter Sierra Club, requests the following documents related to the Smalley-Piper Site, Collierville, Tennessee (EPA ID TND044062222) (the Site):

1. All groundwater sampling reports and/or data, including status reports, for the Site from January 1, 2015, through the date this request is processed.
2. All sampling reports and/or data, for any post-treatment discharges to injection wells and/or any other post-treatment discharges (including by means other than injection wells), for the Site from January 1, 2015 through the date this request is processed.
3. All sampling reports and/or data, for any groundwater or surface water from the Site or monitoring wells related to the Site remediation, from January 1, 2015 through the date this request is processed.
4. All soil sampling reports and/or data, including status reports, for the Site from January 1, 2015, through the date this request is processed.
5. All documents and communications regarding effluent and influent water testing from the on-Site water treatment system including, but not limited to, data from sampling and plans for sampling, from January 1, 2015, through the date this request is processed.
6. All documents and communications regarding the Site from January 1, 2015 until the date this request is processed.

¹ <https://foiaonline.gov/foiaonline/action/public/home>

7. All documents and communications sent by the United States Environmental Protection Agency (EPA) to Carrier Corporation (including any of its contractors or consultants), United Technology Corporation (including any of its contractors or consultants), Ensafe, Incorporated (including any of its contractors or subsidiaries), the City of Collierville, Tennessee (including any of its contractors), the Tennessee Department of Environment and Conservation (including any of its contractors), and any of EPA's contractors, regarding the Site, including responses and replies, as well as all documents and communications received by EPA from any of the entities described above, including responses and replies, from January 1, 2015, until the date this request is processed.
8. All documents discussing any per- and polyfluoroalkyl substances (PFAS) at the Site, including any data collected.
9. All documents and communications regarding the Site including any of the following words and phrases: "TCE," "Well Code," "Well Construction Code," "Shelby County Groundwater Quality Control Board," "Shelby County Groundwater Control Board," or "injection."

For the purposes of this request, the term "documents" includes all written, printed, recorded or electronic: materials, communications, correspondence, emails, memoranda, notations, copies, agency records, studies, reports, meeting notes, diagrams, charts, maps, photographs, tables, spreadsheets, formulas, directives, observations, impressions, contracts, letters, messages and mail in the possession or control of the United States Environmental Protection Agency Region 4, and/or its contractors.

Fee Waiver Request

SELC requests copies (electronic, if possible) without charge, or at a reduced charge, because reduction or waiver of fees would be in the public interest. A disclosure is in the public interest if: (1) it is likely to contribute significantly to public understanding of the operations or activities of the government; and (2) it is not primarily in the commercial interest of the requester.² The public interest standard of FOIA's fee waiver provision should be "liberally construed" in favor of waivers.³ The goal of the statute is to avoid the "roadblocks and technicalities which have been used by various Federal agencies to deny waivers." For the reasons discussed below, SELC's request for a fee waiver should be granted.⁴

I. Disclosure is likely to contribute significantly to public understanding of the operations and activities of the government.

² 40 C.F.R. § 2.107(l)(1).

³ *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 855 (D. Colo. 1994); *Etlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).

⁴ *Pederson*, 847 F. Supp. at 855.

Four factors affect whether disclosure is likely to contribute significantly to public understanding of the operations or activities of the government, and all four factors weigh in favor of granting a fee waiver for this request.

First, “[t]he subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.”⁵ This request seeks documents and correspondence directly related to a Superfund Site and the documents which reflect EPA’s decisions about that Site and the continued compliance with that decision over time. The requested records directly relate to cleanup activities under a federal statute—Comprehensive Environmental Response, Compensation, and Liability Act—which vests significant authority with EPA. The connection between the requested records and government operations and activities is direct and clear.

Second, the information contained in the records must be “‘likely to contribute’ to an understanding of government operations or activities,” based on whether the records will “be meaningfully informative about government operations or activities.”⁶ The requested information would provide valuable information about the ongoing and proposed cleanup activities at the Site. This request asks for documents that EPA is required to keep on hand and up-to-date, so that the public might meaningfully understand and be meaningfully informed of how EPA is carrying out its responsibilities pursuant to CERCLA. This request will inform a broad audience of persons interested in the Superfund Site near their homes, schools, senior care facilities, and community.

Likewise, Protect Our Aquifer is a non-profit whose mission is to “support the protection, conservation and management of the Memphis Sand Aquifer.”⁷ One of Protect Our Aquifer’s primary objectives is to “[r]aise public awareness of the Memphis Sand Aquifer and its value to the community.”⁸ The Site is located above the Memphis Sand Aquifer and Protect Our Aquifer is uniquely situated to inform a broad audience of persons about how the Site’s ongoing remediation may impact the Memphis Sand Aquifer. Protect Our Aquifer has brought public attention to other sites included on the National Priorities List,⁹ and through its website, provides a large library of information to the public.¹⁰

The Sierra Club is a nonprofit organization founded in 1892 that has grown to include over 650,000 members nationwide. The Sierra Club is the largest and most influential grassroots environmental organization in Tennessee, with more than 105,000 members and supporters across the state. The Sierra Club works to safeguard the health of our communities, protect wildlife, and preserve our remaining wild places through grassroots activism, public education, lobbying, and litigation. The Sierra Club’s organizational mission is “to explore, enjoy, and

⁵ 40 C.F.R. § 2.107(l)(2)(i).

⁶ 40 C.F.R. § 2.107(l)(2)(ii).

⁷ <https://www.protectouraquifer.org/>

⁸ *Id.*

⁹ <https://dailymemphian.com/article/4586/Protecting-our-aquifer-Whos-in-charge>

¹⁰ <https://www.protectouraquifer.org/library>

protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.” The Tennessee Chapter Sierra Club maintains a website to disseminate information about the Memphis Sand Aquifer and speaks regularly to the media regarding these issues.¹¹

Protect Our Aquifer, Tennessee Chapter Sierra Club, and SELC are uniquely invested in the protection of the Memphis Sand Aquifer. Each has a particular interest in continuing to inform their members and public understanding of how EPA’s ongoing Superfund oversight and activities impact the Memphis Sand Aquifer. In fact, both SELC and Protect Our Aquifer have informed the public of activities and information regarding the nearby Carrier Superfund Site.¹²

Fourth, disclosure should likely “contribute ‘significantly’ to public understanding.”¹³ As just discussed, the public—including local communities in Shelby County—have been actively engaged in protecting the Memphis Sand Aquifer.¹⁴ However, the public lacks access to key information about EPA’s operations at the Site, because the requested information is not available on EPA’s webpage for this Site.¹⁵ The documents requested are vitally important to public understanding of whether the Memphis Sand Aquifer is adequately protected.

Therefore, these four factors show that disclosure is likely to contribute significantly to public understanding of EPA’s administration of CERCLA and this Superfund Site.

II. The request is not primarily in the commercial interest of SELC or Protect Our Aquifer.

A fee waiver is in the public interest where the request is not in the requestor’s commercial interest.¹⁶ Two factors are evaluated for this determination, and both demonstrate that this request is not in SELC’s or Protect Our Aquifer’s commercial interest.

The first factor is “[t]he existence and magnitude of a commercial interest.”¹⁷ Commercial interest is evaluated per the definition of commercial use request, which is a request

¹¹ See <https://www.sierraclub.org/tennessee/blog/2017/07/arsenic-and-lead-leaking-tvas-allen-memphis-coal-ash-ponds>.

¹² See, e.g., https://wreg.com/2019/12/10/collierville-company-asks-for-permission-to-dump-wastewater-in-ground/?fbclid=IwAR2Jxb5UMv3ZR2hlh9CnclFQbkZsROcjLK3XabtFENL3yb1tApXVgeo_Or8; <https://dailymemphian.com/section/suburbscollierville/article/9405/carrier-corp-wastewater-groundwater-control-memphis-aquifer?fbclid=IwAR22wENwfmhgz31JG8Ot81jEWNAvq8enTEXvix7KUAdZbSpivFvXxfoRiQ>; https://www.localmemphis.com/news/local-news/carrier-wants-to-reinject-wastewater-back-into-the-memphis-sand-aquifer/?fbclid=IwAR0629iddMw1E3a14de9cd7IXiFult4Fg4ri_C5RAwDI7eTvLxm0BF5M4Y; and <https://www.memphisflyer.com/NewsBlog/archives/2019/12/10/board-pauses-carrier-plan-to-inject-treated-wastewater-into-memphis-sand-aquifer?fbclid=IwAR2e291f2uDsarF-BygzdCk6a2gOaf2oZxTYCnkLO51o7swFb6Bb5vMk0IM>.

¹³ 40 C.F.R. § 2.107(l)(2)(iv).

¹⁴ <https://dailymemphian.com/article/5503/Short-term-aquifer-effort-moves-to-long-term-objectives>.

¹⁵ <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.docdata&id=0403684#SC>

¹⁶ 40 C.F.R. § 2.107(l)(2)(i).

¹⁷ 40 C.F.R. § 2.107(l)(3)(i).

from a person “who seeks information for a use or purpose that furthers his/her commercial, trade, or profit interests.”¹⁸ As noted above, SELC, Protect Our Aquifer, and Sierra Club are 501(c)(3) non-profit organizations dedicated, respectively, to protecting the environment of the Southeast and the Memphis Sand Aquifer.¹⁹ Neither has any commercial, trade, or profit interests in seeking these disclosures.

The second factor is the “primary interest in disclosure,” which indicates that fee waivers should be granted when “the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure.”²⁰ As neither SELC nor Protect Our Aquifer and Sierra Club has any commercial interest in these disclosures, the public interest is clearly greater in magnitude.

Each of the organizations requesting this information play a critical role in disseminating information and informing the public on issues related to CERCLA and the Memphis Sand Aquifer. Disclosure of the requested records will clearly benefit the public in understanding EPA’s administration of CERCLA and the health of the Memphis Sand Aquifer. The requested disclosures are likely to significantly contribute to public understanding of government operations, and are not primarily in the requester’s commercial interest. This request therefore meets the two requirements for a fee waiver, and so a fee waiver should be granted.

III. Conclusion

FOIA requires a responding agency to make a “determination” on any request within twenty (20) working days of receipt.²¹ The statute favors disclosure of records and instructs the agency to withhold information only in narrowly defined circumstances in which the agency can articulate a reasonably foreseeable harm protected by an exemption.²² FOIA also requires the release of all reasonably segregable portions of a document that are themselves not exempt.²³ Should EPA Region 4 refuse to provide the information requested, EPA Region 4 must inform SELC of the grounds for its refusal and the specific administrative appeal rights which are available.²⁴ SELC further requests preparation of a *Vaughn* index to facilitate evaluation of the completeness of EPA’s response.²⁵

Should our request for reduced or waived fees be denied, we are prepared to bear the reasonable duplication and search costs necessary to fulfill this request. However, I request you contact me before processing this request if the fee is expected to be in excess of \$100.00. SELC reserves our right to appeal a fee waiver or reduction denial. If you have any questions regarding

¹⁸ 40 C.F.R. § 2.107(b)(1).

¹⁹ See <https://www.southernenvironment.org/about-selc>.

²⁰ 40 C.F.R. § 2.107(l)(3)(ii).

²¹ See 5 U.S.C. § 552(a)(6)(A)(i).

²² See *id.* at § 552(a)(8)(A)(i).

²³ See *id.* at § 552(b).

²⁴ See *id.* at § 552(a)(6)(A)(i).

²⁵ See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) (index should include a detailed justification for claims of exemption, as well as specificity, separation, and indexing of documents).

this request, please feel free to contact me at 615-921-9470 or nwatson@selctn.org. I appreciate your prompt attention to this matter and look forward to receiving the public records requested.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Nathanael Watson", with a large, sweeping flourish extending from the end of the name.

J. Nathanael Watson